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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

CLAUDE A. WERTZ, as Trustee in Bankruptcy of McFerson & Foster Company, Bankrupt,
Petitioner,

v.

NATIONAL CITY BANK OF EVANSVILLE, INDIANA, a corporation under the national banking laws,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

May it please the Court:

Your petitioner, Claude A. Wertz, Trustee in Bankruptcy of McFerson & Foster Company, Bankrupt, prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Seventh Circuit to review the decision and judgment of that court in the above entitled action, and respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE CASE

This cause was one at law and was brought by Claude A. Wertz, as Trustee in Bankruptcy of the McFerson & Foster Company, Bankrupt, against the National City Bank of Evansville, Indiana, to void preferential payments made by the bankrupt to that bank. The action was brought under favor of Section 60(b) of the Bankruptcy Act (11 U. S. C. A. 96-b). The case was filed on April 12, 1937, in the United States District Court for the Southern District of Indiana. It was assigned to and heard by Honorable Charles E. Woodward, United States District Judge for the northern district of Illinois, a jury having been waived (R. Page 138).

The lower court made special findings of fact and conclusions of law (R. Pages 149-154) and on March 16, 1938, entered a judgment for the defendant bank (R. Page 155).

Petitioner gave due notice of appeal, and the case was subsequently argued in the United States Circuit Court of Appeals for the Seventh Circuit. The court handed down its opinion on May 9, 1940, affirming the District Court (R. Page 174).

QUESTIONS PRESENTED

1. Whether the fact that the books of the defendant bank show the account of the bankrupt in the defendant bank to be overdrawn at the time the arrangement was made with the president of the defendant bank, whereby the bankrupt secured money from time to time from the defendant bank without notes or collateral but by merely increasing the amount of the overdraft (as shown by Exhibits 8a to 8h reproduced on pages 9 and 10 of petitioner's brief), and the further fact that the state of the overdraft was continuous for practically the entire ensuing four months immediately preceding bankruptcy, put the defendant bank on inquiry as to the solvency of the bankrupt at that time.

2. Whether the repayment of money from time to time by the bankrupt to the defendant bank in the form of deposits, but which payments, until nearly the end of the four month period, never wiped out the overdraft or debit balance and never created a credit balance in favor of the defendant bank, were deposits made in the due course of business or were payments made against a pre-existing indebtedness.

3. Whether there was the right of set off against the bankrupt existing in favor of the defendant bank at the beginning of the four month period.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The decision of the United States Circuit Court of Appeals for the Seventh Circuit in the instant case is in conflict with the decision of the United States Circuit Court of Appeals for the Fourth Circuit in the case of *Bank of Commerce and Trusts* v. *Hatcher,* 50 F. (2d) 719, decided by that court on the 17th day of June, 1931.

2. The United States Circuit Court of Appeals in the instant case has rendered an opinion and entered a judgment respecting recoverable preferences in bankruptcy in conflict with the general weight of authority.

3. The banking practice followed in this case, and approved by the Circuit Court of Appeals in its opinion and judgment, raises questions of great public interest.

WHEREFORE, your petitioner respectfully prays that his writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the Record and all proceedings in the case numbered and entitled on its docket,

No. 7016, Claude A. Wertz, Trustee in Bankruptcy of McFerson & Foster Company, Bankrupt, against National City Bank of Evansville, Indiana, a corporation under the national banking laws, and that the said decree (or judgment) of the United States Circuit Court of Appeals for the said Circuit may be reversed by this Honorable Court and that your petitioner may have such other and satisfactory relief in the premises as this Honorable Court may see meet and just; and your petitioner will ever pray.

FRANK W. COTTLE
Counsel for Petitioner

FLOYD C. WILLIAMS,
JOHN H. DRUFFEL, JR.,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINIONS BELOW

Before argument, the trial judge suggested to counsel that they present tentative findings of fact and conclusions of law as a means of setting forth "their points" which they intended to stress in argument. This was done, each counsel naturally presenting the most favorable construction of the facts and the most helpful interpretation of the law. The trial judge did not write an opinion, but adopted the findings of fact and conclusions of law (R.

Pages 149-154) as submitted by counsel for the bank, and entered judgment thereon (R. Page 155).

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is printed in the Record (page 174).

JURISDICTION

The judgment to be reviewed in this case is the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, in the case of Claude A. Wertz, as Trustee in Bankruptcy of the McFerson & Foster Company, a Bankrupt, v. National City Bank of Evansville, Indiana, Case No. 7016, decided on the 9th day of May, 1940.

Petitioner invokes the exercise of the jurisdiction by this Honorable Court in this cause for the reason that the United States Circuit Court of Appeals for the Seventh Circuit has decided a question of substance in conflict with decisions of the courts of other Circuits and not in accord with the great weight of authority.

The jurisdiction of this Honorable Court is invoked under Section 60(b) of the United States Bankruptcy Act (11 U. S. C. A. 96-b).

STATEMENT OF FACTS

It was stipulated and agreed at the trial, by and between the parties to this action, that certain facts be considered as proven and established in the same manner and to the same extent and effect as if competent evidence had been introduced establishing their existence, as follows:

1. That on the 29th day of February, 1936, an involuntary petition in bankruptcy was duly filed in the office of the Clerk of the United States District Court, for the Southern District of Indiana, Evansville Division, by certain creditors of the McFerson & Foster Company, of Evansville, Indiana, a corporation duly organized and doing business by virtue of the laws of the State of Indiana.

2. That on the 21st day of March, 1936, the said McFerson & Foster Company was duly adjudicated a bankrupt by the United States District Court, for the Southern District of Indiana, Evansville Division.

3. That on the 6th day of May, 1936, the plaintiff, Claude A. Wertz, was duly appointed the Trustee in Bankruptcy of the estate of said McFerson & Foster Company, and duly qualified as such and has been continuously since said date and is now the duly qualified, acting and sole Trustee of said bankrupt estate.

4. That the plaintiff herein has been duly authorized and directed to institute and prosecute this action by an order of the Honorable George F. Zimmerman, Referee in Bankruptcy of and for the Evansville Division of the United States District Court, for the Southern District of Indiana, before whom said bankruptcy proceeding has been pending continuously since the date of adjudication.

5. That the defendant is a banking corporation doing business by virtue of the laws of the United States of America, with its banking house and principal place of business in the city of Evansville, county of Vandenburgh, State of Indiana.

6. That the assets of said bankrupt, McFerson & Foster Company, are not now and have not been at any time since the institution of the bankruptcy proceedings, sufficient to pay claims filed and allowed in said bankruptcy proceedings, and that there has existed and does now exist a deficiency of assets with which to meet liabilities of said bankrupt, to the amount of more than Fifty Thousand Dollars ($50,000.00).

7. That on the 15th day of March, 1937, and prior to the commencement of this action, the plaintiff, as Trustee of the bankrupt estate of said McFerson & Foster Company, duly demanded in writing, the payment to him by the defendant of the various sums alleged and sought to be re-

covered by each of the paragraphs of complaint herein, and that the defendant has failed to comply with such demand and refused to return or pay any of said sums to the plaintiff.

The facts adduced by the testimony and the evidence establish that the McFerson & Foster Company was engaged in the business of fabricating wooden boxes in Evansville, Indiana, and for a number of years prior to the bankruptcy had been in bad shape financially.

An arrangement was made between the McFerson & Foster Company, the bankrupt in this case, and the National City Bank of Evansville, Indiana, the defendant in this case, whereby the bankrupt could, without a note or any collateral, secure advances of money in the nature of loans by further overdrawing its account with the defendant bank. Said account was already overdrawn at the time the original arrangement was made. The arrangement was concluded in order that the McFerson & Foster Company could continue in business and supply boxes to its customers.

This arrangement was carried out, and for many months prior to the bankruptcy the bankrupt secured large amounts of money and was continuously overdrawn at the defendant bank. The McFerson & Foster account with the defendant bank showing the almost continuous overdraft appears on copies of the bank's ledger sheets printed in the petitioner's brief on pages 9 and 10. The amount of the overdraft was reduced from time to time by the deposit of funds in the defendant bank, which funds were received by the McFerson & Foster Company from its customers, whom they supplied with boxes.

The petitioner contends that the arrangement made between the McFerson & Foster Company and the defendant bank was made in order that the bankrupt could secure money with which to continue in business; that the effect of

this arrangement was to repay all the money so advanced by the bank and to deprive the other creditors of the McFerson & Foster Company, except the defendant bank, of their share of the bankrupt's estate. That in point of fact this arrangement between the bankrupt and the defendant bank, who knew the bankrupt was insolvent when it made this arrangement, did deprive other creditors of receiving their percentage of the bankrupt's estate.

For a more complete statement of all the facts, this Honorable Court is referred to the Narrative Statement of the Record printed on Page 140, *et seq.*

ARGUMENT

1. A Bank Is Put on Inquiry as to the Solvency of a Depositor When That Depositor Seeks to Obtain Advances from the Bank Without a Present Consideration and Without Any Note or Any Collateral, but Through an Arrangement Made With the President of the Bank, Whereby the Depositor, Whose Account at the Bank Was at the Time Overdrawn, Might Increase that Overdraft from Time to Time by the Added Amount of the Advance then Desired.

The United States Circuit Court of Appeals in its opinion (R. Pages 178-179) said:

> ". . . However, appellant (obviously means appellee) contends, and the District Court so found, that the bank had no knowledge of that insolvency during the period in which the deposits were made, and that it did not have reasonable ground to believe that that was true. It is true that these facts are controverted by oral testimony, and different triers might have found differently upon consideration of all the evidence . . ."

The facts as shown by the bank records; that is to say, the ledger sheets, reflecting the account of the bankrupt with the defendant bank, are not and cannot be "controverted."

The ledger sheets are herewith reproduced.

OLD BALANCE	DATE	CHEQUES	DATE	DEPOSITS	DATE	BALANCE
		BALANCE BROUGHT FORWARD	OCT 28-35	3,304 36-	OCT 28-35	3,304 36cd
3,304 36-	OCT 29-35	2,432 23-	OCT 29-35	1,738 43	OCT 29-35	3,998 16cd
3,998 16-	OCT 30-35	802 93-	OCT 30-35	275 13	OCT 30-35	4,226 96cd
4,226 96-	OCT 31-35	906 00-	OCT 31-35	2,739 63	OCT 31-35	2,392 33cd
2,392 33-	NOV 1-35	729 89-	NOV 1-35	792 55	NOV 1-35	2,329 67cd
2,329 67-	NOV 2-35	362 76-	NOV 2-35	188 20	NOV 2-35	2,504 23cd
2,504 23-	NOV 4-35	609 72-	NOV 4-35	84 88	NOV 4-35	3,049 09cd
3,049 09-	NOV 5-35	3,158 92-	NOV 5-35	1,608 40	NOV 5-35	4,599 61cd
4,599 61-	NOV 6-35	799 03-	NOV 6-35		NOV 6-35	3,398 64cd
3,398 64-	NOV 7-35	740 62-	NOV 7-35	187 80	NOV 7-35	3,951 46cd
3,951 46-	NOV 8-35	136 43-	NOV 8-35	145 80	NOV 8-35	3,942 29cd
3,942 29-	NOV 9-35	2,111 72-	NOV 9-35	1,885 73	NOV 9-35	3,188 28cd
3,188 28-	NOV 12-35	1,011 30-	NOV 12-35	197 30	NOV 12-35	3,982 28cd
3,982 28-	NOV 13-35	2,756 15-	NOV 13-35	1,098 08	NOV 13-35	3,842 35cd
3,842 35-	NOV 14-35	726 94-	NOV 14-35	28 38	NOV 14-35	3,340 91cd
3,340 91-	NOV 15-35	1,287 65-	NOV 15-35	4,636 71	NOV 15-35	6,991 85cd
6,991 85-	NOV 16-35	1,288 37-	NOV 16-35	138 49	NOV 16-35	7,139 73cd
7,139 73-	NOV 18-35		NOV 18-35	863 45	NOV 18-35	8,276 28cd
8,276 28-	NOV 19-35	4,913 97-	NOV 19-35	466 24	NOV 19-35	10,724 01cd
10,724 01-	NOV 20-35	1,369 76-	NOV 20-35	2,083 51	NOV 20-35	10,010 28cd
10,010 28-	NOV 21-35	1,980 65-	NOV 21-35	4,203 84	NOV 21-35	7,767 07cd
7,767 07-	NOV 22-35	834 24-	NOV 22-35	1,134 61	NOV 22-35	7,166 70cd
7,166 70-	NOV 23-35	838 82-	NOV 23-35	1,779 78	NOV 23-35	8,225 74cd
8,225 74-	NOV 25-35	1,717 98-	NOV 25-35	130 28	NOV 25-35	7,813 42cd
7,813 42-	NOV 26-35	3,842 87-	NOV 26-35	1,765 67	NOV 26-35	5,890 62cd
5,890 62-	NOV 27-35	595 86-	NOV 27-35	171 93	NOV 27-35	10,114 55cd
10,114 55-	NOV 29-35	1,478 49-	NOV 29-35	985 10	NOV 29-35	10,807 94cd
10,807 94-	NOV 30-35	1,286,09-	NOV 30-35	6,311 62	NOV 30 35	8,882 41cd
8,582 41-	DEC 2-35	580 69-	DEC 2-35	386 80	DEC 2-35	8,778 30cd
8,778 30-	DEC 3-35	5,111 20-	DEC 3-35	2,644 40	DEC 3-35	9,243 10cd
9,243 10-	DEC 4-35	1,234 58-	DEC 4-35	282 70	DEC 4-35	10,194 98cd
10,194 98-	DEC 5-35	1,287 05-	DEC 5-35	1,453 30	DEC 5-35	10,008 73cd
10,008 73-	DEC 6-35	880 89-	DEC 6-35	72 98	DEC 6-35	10,816 66cd
10,816 66-	DEC 7-35	958 67-	DEC 7-35	2,923 21	DEC 7-35	8,852 12cd
8,852 12-	DEC 9-35	1,368 00-	DEC 9-35	1,012 23	DEC 9-35	9,197 89cd
9,197 89-	DEC 10-35	2,134 92-	DEC 10-35	2,694 78	DEC 10-35	8,638 05cd
8,638 05-	DEC 11-35	757 68-	DEC 11-35	37 70	DEC 11-35	9,388 03cd
9,388 03-	DEC 12-35	3,911 53-	DEC 12-35	1,719 25	DEC 12-35	11,880 31cd
11,880 31-	DEC 13-35	758 45-	DEC 13-35	26 10	DEC 13-35	12,282 66cd
12,282 66-	DEC 14-35	1,120 16-	DEC 14-35	3,102 03	DEC 14-35	10,300 79cd
10,300 79-	DEC 16-35	783 49-	DEC 16-35	320 32	DEC 16-35	10,763 96cd
10,763 96-	DEC 17-35	1,784 09-	DEC 17-35	1,576 17	DEC 17-35	10,971 88cd



OLD BALANCE	DATE	CHECKS	DATE	DEPOSITS	DATE	BALANCE
		BALANCE BROUGHT FORWARD DEC				
10,971 88-	DEC 18-35	603 71-	DEC 18-35	96 52	DEC 18-35	11,379 07cd
11,379 07-	DEC 19-35	1,144 10-	DEC 19-35	3,326 36	DEC 19-35	9,198 81cd
9,198 81-	DEC 20-35	1,201 31-	DEC 20-35	12 66	DEC 20-35	10,385 46cd
10,385 46-	DEC 21-35	687 99-	DEC 21-35	3,411 86	DEC 21-35	7,861 59cd
7,861 59-	DEC 23-35	1,527 30-	DEC 23-35	724 62	DEC 23-35	8,464 27cd
8,464 27-	DEC 24-35	1,795 83-	DEC 24-35	1,309 39	DEC 24-35	8,950 71cd
8,950 71-	DEC 26-35	1,049 85-	DEC 26-35	1,845 59	DEC 26-35	9,154 77cd
9,154 77-	DEC 27-35	687 99-	DEC 27-35	2,288 12	DEC 27-35	8,574 64cd
8,574 64-	DEC 28-35	497 85-	DEC 28-35	3,249 62	DEC 28-35	3,822 67cd
3,822 67-	DEC 30-35	1,000 19-	DEC 30-35	4,285 98	DEC 30-35	536 90cd
536 90-	DEC 31-35	1,670 89-	DEC 31-35	2,527 96	DEC 31-35	420 37 *
420 37	JAN 2-36	1,582 99-	JAN 2-36	2,000 51	JAN 2-36	837 89 *
837 89	JAN 3-36	1,263 37-	JAN 3-36		JAN 3-36	418 48cd
418 48-	JAN 4-36	1,478 74-	JAN 4-36	1,445 89	JAN 4-36	446 33cd
446 33-	JAN 6-36	550 02-	JAN 6-36	777 18	JAN 6-36	227 20cd
227 20-	JAN 7-36	2,697 22-	JAN 7-36	943 59	JAN 7-36	1,980 83cd
1,980 83-	JAN 8-36	670 47-	JAN 8-36	285 71	JAN 8-36	2,286 59cd
2,286 59-	JAN 9-36	732 88-	JAN 9-36	2,499 94	JAN 9-36	818 33cd
818 33-	JAN 10-36	888 53-	JAN 10-36	989 52	JAN 10-36	397 34cd
397 34-	JAN 11-36	847 04-	JAN 11-36	767-14	JAN 11-36	177 24cd
177 24-	JAN 13 36	400 83-	JAN 13-36	2,876 93	JAN 13-36	2,297 86 *
2,297 86	JAN 14-36	1,638 48-	JAN 14-36	487 19	JAN 14-36	1,146 57 *
1,146 57	JAN 15-36	1,858 86-	JAN 15-36	72 90	JAN 15-36	839 39cd
839 39-	JAN 16-36	719 78-	JAN 16-36	2,027 93	JAN 16-36	668 76 *
668 76	JAN 17-36	267 15-	JAN 17-36	685 35	JAN 17-36	1,086 96 *
1,086 96	JAN 18-36	1,150 72-	JAN 18-36	2,155 44	JAN 18-36	2,091 68 *
2,091 68	JAN 20-36	1,406 89-	JAN 20-36	1,895 24	JAN 20-36	2,580 25 *
2,580 25	JAN 21-36	3,627 12-	JAN 21-36		JAN 21-36	1,046 87cd
1,046 87-	JAN 22-36	828 84-	JAN 22-36	1,679 77	JAN 22-36	196 74cd
196 74-	JAN 23-36	26 00-	JAN 23-36	1,754 82	JAN 23-36	1,833 88 *
1,833 88	JAN 24-36	1,088 78-	JAN 24-36	289 42	JAN 24-36	754 85 *
754 85	JAN 26-36	1,248 98-	JAN 25-36	1,485 06	JAN 25-36	992 64 *
992 64	JAN 27-36	810 34-	JAN 27-36	1,268 77	JAN 27-36	1,451 07 *
1,451 07	JAN 28-36	2,077 63-	JAN 28-36	82 80	JAN 28-36	574 06cd
574 06-	JAN 29-36	1,206 67-	JAN 29-36	2,222 78	JAN 29-36	443 05 *
443 05	JAN 30-36	1,081 84-	JAN 30-36	915 91	JAN 30-36	307 12 *
307 12	JAN 31-36	1,134 71-	JAN 31-36	1,589 43	JAN 31-36	761 84 *
761 84	FEB 1-36	1,550 81-	FEB 1-36	1,752 00	FEB 1-36	963 03 *
963 03	FEB 3-36	1,300 16-	FEB 3-36	747 48	FEB 3-36	410 35 *
410 35	FEB 4-36	1,382 38-	FEB 4-36	27 95	FEB 4-36	914 08cd
914 08-	FEB 5-36	1,364 95-	FEB 5-36	2,561 16	FEB 5-36	292 13 *
292 13	FEB 6-36	1,184 24-	FEB 6-36	548 70	FEB 6-36	323-41cd
323 41-	FEB 7-36	1,288 11-	FEB 7-36	1,216 81	FEB 7-36	395 71cd
395 71-	FEB 8-36	832 56-	FEB 8-36	1,807 93	FEB 8-36	379 66 *

The figures and the notations "cd" are copied exactly from the original ledger sheets.

The rule of law applicable is that it is sufficient to show that the bank had reasonable grounds to believe the bankrupt was insolvent. The circumstances should be such that a man of ordinary prudence would have knowledge of the insolvency.

In the case of *Irving Trust Company* v. *Manufacturers' Trust Company*, 8 Fed. Supp. 527, it was held:

> "The only remaining question is whether the bank had reasonable cause to believe that a preference would be effected; and, on that issue, the test is not what the bank actually knew, but whether it was put on inquiry, and, if so, what a reasonable investigation would have disclosed."

In the case of *Irving Trust Company* v. *Bank of Manhattan Trust Co.*, 8 Fed. Supp. 690, the court said:

> "I think, though, that the bank's own records are sufficient to charge the bank with the duty of inquiring; and, if a proper inquiry had been made, the preferential nature of the transfers would have appeared."

We submit that the bank in this case is charged with the knowledge of its own records, and that said records, reflecting a continuous overdraft in the McFerson & Foster Company account from September 5, should have put the bank on inquiry as to the financial condition of the McFerson & Foster Company, and said records are themselves sufficient evidence from which the bank should be held to have had reasonable grounds to believe that the McFerson & Foster Company was insolvent. The arrangement whereby the overdraft was permitted; the knowledge of the cashier of the defendant bank of the state of the continuing overdraft; the taking of assigned accounts as security; the knowledge that at no time from September 5 to December 31 there was ever a credit balance in the account of the McFerson & Foster Company, are conclusive of the fact of insolvency, and the defendant bank must be held, not only

to have reasonable grounds to believe that the McFerson & Foster Company was insolvent, but to have actually known of that insolvency.

See also the case of *Pender* v. *Chatham Phenix National Bank and Trust Co.*, 58 F. (2d) 968, and *Wright* v. *William Skinner Mfg. Co.*, 162 Fed. 315-317.

2. After the Advances Were So Made, Any Payments by the Bankrupt to the Bank in the Form of Deposits, Which on the Books of the Bank Were Immediately Credited Against the Amount of the Then Existing Overdraft, but Without Fully Paying It Cannot Be Said to Be Deposits Made in the Due Course of Business, but Are Voidable Preferential Payments Within the Meaning of Section 60(b) of the Bankruptcy Act.

The ledger sheets reflecting the account of the McFerson & Foster Company with the defendant bank (plaintiff's Exhibits 8a to 8h) conclusively establish the payment by the McFerson & Foster Company to the defendant bank, and the ledger sheets further show the amount of payments which the bankrupt had made to the bank. The Trustee claims that when said payments were made, although they were in the form and nature of deposits in their own account, they were in truth and in fact transfers of their own money to the defendant bank to be applied as payments on a then existing indebtedness of the McFerson & Foster Company to the defendant bank.

In order to establish a preference, as claimed by the Trustee in Bankruptcy in this case, it is necessary to prove that when the money in question was turned over by the bankrupt to the bank it was a transfer of its property; that is to say, a passing of the right, title, interest and control thereof, such as would be accomplished if the money were turned over to the bank as payment on a debt as distinguished from merely placing the money with the bank as a deposit, retaining the right to control the disposition of

said funds, such as would be the case if the account of the McFerson & Foster Company with the bank, after the receipt of that money, would reflect a credit balance or establish the relationship of debtor and creditor between the bankrupt and the bank. In other words, if the relationship of debtor and creditor were created between the bank and bankrupt, then the bank might assert the right of set off under favor of Section 68(a) of the Bankruptcy Act, but if the relationship were not that of debtor and creditor, but such that the bank by its action accepted the money left with it by the bankrupt as payment on preexisting indebtedness, such payments would constitute transfers void as preferential under Section 60(b).

The question in this case is the same as was the question presented in the case of *Bank of Commerce and Trusts* v. *Robert V. Hatcher,* 50 F. (2d) 719.

The decision in the instant case by the Court of Appeals of the Seventh Circuit is, in our opinion, in conflict with the opinion in the Hatcher case.

There are many other cases which announce and follow the rule as laid down in the Hatcher case. None of said cases were followed by the United States Circuit Court of Appeals of the Seventh District. Indeed, none of these cases, except the Hatcher case, was even mentioned, and that case is mentioned only for the purpose of making the categorical statement that "the facts, however, are quite different, and this accounts for the different conclusions." The cases referred to are *Rupp* v. *Commerce Guardian Trust and Savings Bank* (U. S. Circuit Court of Appeals, Sixth Circuit) 32 F. (2d) 234; *Frankford Trust Co.* v. *Comber, et al.* (Circuit Court of Appeals, Third Circuit) 68 F. (2d) 471; *Callaway* v. *West Palm Beach Atlantic National Bank* (Circuit Court of Appeals, Sixth Circuit) 69 F. (2d) 224; *Twentieth Street Bank* v. *Gilmore,* (United States Circuit Court of Appeals, Fourth Circuit) 71 F. (2d) 594; *First Wisconsin National Bank of Milwaukee* v.

Charness (United States Circuit Court of Appeals, Seventh Circuit) 73 F. (2d) 730.

3. Whatever May Be the Right of Set Off Under Favor of Section 60-c, No Such Right of Set Off Exists at the Beginning of the Four Month Period So As to Permit the Defendant Bank in this Case to Set Off the Amount of the Overdraft Existing at the Beginning of the Arrangement for Advancing Money by the Bank to the Bankrupt.

The amount deposited by the bankrupt during the period of the arrangement was for the most part credited in the sense that the amount of said deposit, which was actually a payment, was subtracted from the then overdraft. Thus it seldom resulted in a credit balance, but usually resulted in a reduction of the then debit balance.

The mere fact that the bank honored checks, or to use the words of the trial court permitted the withdrawals "without limitations or restrictions," does not make the so-called deposits "in the usual course of business." It was simply a means of loaning money without complying with either the laws affecting national banks or the rules and regulations controlling good banking practices.

The Circuit Court of Appeals' decision holding that right of set off exists at the beginning of the four month period is clearly erroneous. The decision of this court is in conflict with the decision of several other Circuit Courts, and there is a need of a decision by the Supreme Court of the United States settling and classifying the law on this subject. The opinion of the United States Circuit Court of Appeals approving of the continuous overdraft arrangement establishes a dangerous precedent, dangerous not only to the bank and its creditors but to the creditors of the overdrawing depositor.

Respectfully submitted,

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No. 298

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

CLAUDE A. WERTZ, as Trustee in Bankruptcy of McFERSON & FOSTER COMPANY, Bankrupt,
Petitioner,

vs.

NATIONAL CITY BANK OF EVANSVILLE, INDIANA, a Corporation Under the National Banking Laws,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

ISIDOR KAHN,
Counsel for Respondent.

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EDWARD O. CRAFT,
Of Counsel.

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS OF THE COURTS BELOW.

The trial court did not write an opinion. Its findings of fact and conclusions of law appear in the record (R. 150-154). The judgment of the trial court appears in the record (R. 155).

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit has not yet been published in the official report. It is set out in the record (R. 174-180).

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THE COURT IS INVOKED.

Petitioner's petition for review on writ of certiorari does not contain "A statement particularly disclosing the basis upon which it is contended that this court has jurisdiction to review the judgment or decree in question"; such omission in this respect violates the requirement of **Rule 38, paragraph 2, 28 U. S. C. A.**, following Section 354. The same paragraph of Rule 38 also provides: "A failure to comply with these requirements will be a sufficient reason for denying the petition."

In Petitioner's brief in support of his petition for writ of certiorari, at page 5 thereof will be found several paragraphs under the heading, "Jurisdiction." The petition must be complete and sufficient within itself without reference to the supporting brief.

> General Talking Pictures Corp. v. Western Electric Co., Inc., et al., 304 U. S. 175.

If, however, it were permissible to refer to the brief for the purpose of supplying a deficiency in the petition, then it is submitted the statements contained in Petitioner's brief under the heading of "Jurisdiction" fall far short of setting out the basis upon which it is contended that this court has jurisdiction in the instant case.

STATEMENT OF THE CASE.

In his petition and under the heading: "Summary Statement of the Case," appearing at page 2, is an inadequate statement of certain facts involved in this case. The Petitioner undertakes to set out in his brief beginning at page 5 under the heading "Statement of Facts" the facts in this case. The facts embraced in the para-

graphs numbered 1 to 7, inclusive, are correctly stated in accordance with the stipulation of the parties in the trial court. The remaining facts are incorrectly stated. For this reason Respondent deems it necessary to set out such portion of the facts which in its judgment are material to the consideration of the questions sought to be presented.

The following facts rest on the concurrent findings of the trial court and the United States Circuit Court of Appeals for the Seventh Circuit:

A state court receiver was appointed for the debtor on February 18th, 1936. Prior to this time, Respondent had no reasonable cause to believe that the debtor was insolvent. Until December 25th, 1935, the debtor had made all payments on its merchandise accounts regularly and promptly as they became due and payable (R. 151 and R. 175).

During the period covered by the Petitioner's complaint, the debtor maintained a checking account with Respondent and made daily deposits therein in the ordinary and usual course of business, and such deposits were received by Respondent in the ordinary and usual course of business. Each alleged preferential payment was one of such deposits; each was subject to withdrawal by the debtor's check; and there were no limitations or restrictions on the debtor's right to issue checks on that account. In the ordinary and usual course the debtor issued checks against that account and the Respondent paid them. Each deposit and each withdrawal was a part of a running account between the debtor and Respondent, a series of mutual debits and credits. The account at times showed credit balances in favor of the debtor, but at most times showed overdrafts (R. 152 and R. 175).

At times during the period in controversy, the debtor assigned accounts receivable to the Respondent, but they were not effective as security because the debtor retained exclusive control of such accounts. During the time the debtor deposited in this account a total of $115,638.66, and there was withdrawn from such account by the debtor's checks a total of $111,954.64. During this period there was deposited $3,684.02 more than there was withdrawn, of which some $379.66 was a credit in favor of the debtor at the close of business on February 8th, 1936, which was the date of the last alleged preferential payment. This sum was paid to the debtor (R. 152 to 153 and R. 175).

At the beginning of business on October 29, 1935, which was the beginning of the four months period prior to the filing of the petition in bankruptcy, the debtor was indebted to the defendant, by reason of an overdraft in the checking account in the sum of $3,304.36 (R. 153 and R. 175).

Each withdrawal from the checking account after the Respondent had been preferred, if there was a preference, was a giving by the Respondent of further credit in good faith without security of any kind for property which then became a part of the estate of the debtor, and the amount of such new credits remaining unpaid at the time of the adjudication in bankruptcy, when set off against the amounts which would otherwise be recoverable from the Respondent, if there was a preference, equals the amount of the alleged preferences, except as to the amount of $3,304.36 (R. 153 and R. 176).

None of the deposits made by the debtor, including the alleged preferential payments, depleted its assets except as to the amount of $3,304.36. None of the deposits, including the alleged preferential payments, was made by

the debtor or received by the Respondent for the purpose of building up the deposits for the benefit of the Respondent or to enable the Respondent to exercise its right of set-off, or with a view to such use, and the alleged preferential payments, except the amount of $379.66, were applied by the Respondent under its right of set-off to the payment of the overdraft in the amount of $3,304.36 existing at the beginning of business on October 29, 1935. (R. 153-154 and R. 176).

None of the alleged preferential payments was in fact a preferential payment, or a payment of any kind, but that each was a deposit in the checking account, and that none of such deposits created a preference in favor of Respondent against the other creditors of the bankrupt, and that the Respondent did not believe or know, or have reasonable cause to believe or know, that any of such deposits were intended as a preference in its favor (R. 154 and R. 176).

Upon the foregoing facts, the courts concluded that the Respondent was entitled to a set-off, if there was a preference, under paragraph 8 of the Respondent's answer, pursuant to the provisions of Section 60 (c) of the Bankruptcy Act, relying upon **In re Evansville Broom Company, 29 Fed. (2d) 643** (R. 153 and R. 176); and also concluded that the Respondent was entitled to such set-off, if there was a preference, under paragraph 9 of its answer, pursuant to the provisions of 68 (a) and (b) of the Bankruptcy Act (R. 154 and R. 176); and further concluded that the Petitioner was not entitled to recover in his action and thereupon dismissed the action at the cost of the Petitioner (R. 154 and R. 176).

It is important to call to the Court's attention the fact that Petitioner, according to the reference at page 8 of his brief, relies for the facts set out in the brief upon

"Claim of Plaintiff" (R. 140-143) (Plaintiff below is the Petitioner herein) rather than upon the testimony as set out in the Record or the Findings of Fact of either the trial court or the reviewing court.

Attention is respectfully called to the fact that copy of what is presumed to be an exhibit is set out as pages 9 and 10 of Petitioner's brief. A search of the Record reveals no such exhibit to be therein contained. **Rule 10, Paragraph 3, 28 U. S. C. A., following Section 354.**

SPECIFICATION OF ASSIGNED ERRORS AS ARE INTENDED TO BE URGED.

In his brief in support of this petition herein the Petitioner has neither assigned errors which he intends to urge in support of his petition for a writ of certiorari, nor has he set out or specified in his said brief any matters or propositions in lieu of such assigned errors which would serve to identify and challenge the rulings upon which is grounded the ultimate decision of the matter involved. **Rule 27, Paragraph 2 (e), 28 U. S. C. A., following Section 354.**

SUMMARY OF ARGUMENT.

1. Propositions 1 and 2 under "Questions Presented" do not present a legal question, but each presents a question of fact.

2. Whether or not the Respondent had reasonable cause to believe that it was intended that a preference be given it is a question of fact.

3. Whether or not a deposit made by a bankrupt was in good faith in the usual course of business or a mere form of transferring the amount thereof to the bank to be

applied on the indebtedness of the bankrupt under such circumstances as to constitute it a voidable preference are questions of fact.

4. The Supreme Court of the United States will not grant a writ of certiorari for the purposes of reviewing the evidence and discussing specific facts.

5. In passing upon an application for a writ of certiorari,, the Supreme Court accepts the findings in which two courts concur.

6. This case is governed by the provisions of the Bankruptcy Act prior to the amendments of June 22, 1938.

7. Where deposits are not made by the bankrupt or received by a bank for the purpose of building up such deposit for the benefit of the bank or to enable it to exercise its right of set-off or with a view to such use the bank is entitled to set-off under the provisions of Section 68 (a) and 68 (b) of the Bankruptcy Act.

8. The opinion and judgment in the instant case is not in conflict with the opinion and decision in **Bank of Commerce & Trusts v. Hatcher, 50 Fed. (2d) 719 (C. C. A. 4th),** nor with the opinions and decisions of the other cases cited at p. 13 of Petitioner's brief.

9. The Court will not grant certiorari to Circuit Courts of Appeals merely to give the defeated party another hearing, but only to secure uniformity of decision between such courts or to bring up cases of importance which it is in the public interest to have decided by the court of last resort.

10. The banking practice involved is entirely of a private nature and not a public concern.

ARGUMENT.

QUESTIONS PRESENTED.

THE FIRST PROPOSITION under "Questions Presented" includes the following language:

> " . . . At the time the arrangement was made with the President of the defendant bank whereby the bankrupt secured money from time to time, etc. . . . ".

Obviously, the Petitioner seeks to have the court understand that an arrangement had been made with the President of the Respondent bank whereby and under which the debtor secured money. Such a fact was not found by either the trial court or the Circuit Court of Appeals. More than that, there is nothing in the record, other than what is contained in a document denominated "Claim of Plaintiff" (R. 140-143), showing or tending to show that any such arrangement was made with the Respondent or with its President.

Essentially and actually, this first proposition presents not a legal question but a question of fact. Apparently the Petitioner is saying that the Respondent was put on inquiry as to the solvency of the bankrupt at the time. Manifestly, the Petitioner is seeking to raise the question whether or not the Respondent believed or had reasonable cause to believe that by making the deposits, preferences in its behalf were thereby effected.

(It must be noted that the transactions involved in this case are governed by the provisions of the Bankruptcy Act prior to the amendments of June 22, 1938.)

If Petitioner intends to raise the question on the basis of whether or not Respondent knew or had reasonable grounds to know that the bankrupt was insolvent at the

time the deposits were made, or whether he seeks to raise the question as to whether or not the Respondent believed or had reasonable cause to believe that by making the deposits, preferences in its behalf were thereby effected, then in both instances, essentially and exclusively, a question of fact is raised. In **Kaufman v. Tredway, 195 U. S. 271**, the court said:

> "Whether the bankrupt was insolvent on August 4th, 1898, when he paid the money to his brother, the defendant, and whether the latter had reasonable cause to believe that it was intended thereby to give a preference, are questions of fact, determined by the verdict of the jury, and not open to review in this court." (Citing cases.)

To the same effect, and without exception, is a long and unbroken line of decisions of both the federal and state courts.

THE SECOND PROPOSITION set out under "Questions Presented" seeks to assume that the deposits were "the repayment of money from time to time by the bankrupt to the defendant (Respondent) bank". The assumption of such fact is entirely unwarranted. The concurrent findings of the trial court and the Circuit Court of Appeals are definitely and precisely to the effect that each such deposit was not a repayment, that it was made by the bankrupt and accepted by the Respondent bank as a deposit and from day to day was checked against by the bankrupt without restriction or limitation on the part of the Respondent, and the checks so made were honored and paid from day to day by the Respondent bank; all of which transactions were in the usual and ordinary course of business; that each deposit and each withdrawal was a part of a running account between the bankrupt and the Respondent bank—a series of mutual debits and credits.

Again, this second proposition seeks to assert not a question of law but a question of fact essentially and exclusively. Whether a deposit made by the bankrupt was in good faith in the usual course of business or whether it was a mere form or manner of transferring the amount thereof to the bank to be applied on the indebtedness of the bankrupt under such circumstances as to constitute the deposit a voidable preference are questions of fact to be determined by the court or jury trying the case.

German-American State Bank v. Larimer, 235 Fed. 501 (C. C. A. 8th);
Bank of Calif. v. Brainard, 3 Fed. (2d) 3 (C. C. A. 9th).

The Petitioner, having had questions of fact decided against his contention both by the trial court and the reviewing court, is now seeking a further review of the facts in the case by this court. The Supreme Court of the United States has consistently declined to do this. In **United States v. Johnston, 268 U. S. 230**, the rule is stated as follows:

> "We do not grant a certiorari to review evidence and discuss specific facts."

In **Houston Oil Company of Texas v. Goodrich, 245 U. S. 440**, the following language is used:

> "The propriety of submitting these matters depended essentially upon an appreciation of the evidence. Having heard it all, the trial court concluded there was not enough to support any one of petitioners' above-stated claims to warrant a finding in their favor, and the Circuit Court of Appeals reached the same result. **226 F. 434, 141 C. C. A. 264.**
>
> "The record discloses no sufficient reason within the rule long observed why we should review the judgment below. **Forsyth v. Hammond, 166 U. S. 506, 17 S. Ct. R. 665, 41 L. Ed. 1005.**"

In **Page v. Arkansas Natural Gas Corporation, 286 U. S. 269**, the rule is stated as follows:

> "Many and complicated questions of fact are involved and were argued here, but, as they have been found in favor of the respondent by both courts below, we do not review them (see **Texas & N. O. R. Co. v. Brotherhood of Railway & Steamship Clerks, 281 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034**), and we confine ourselves to the question of the jurisdiction of the referee in bankruptcy."

To the same effect is the decision of **In re Tax Service Association of Illinois, 305 U. S. 160.**

The facts as specially found in this case by the trial court were in their entirety concurred in by the Circuit Court of Appeals. In its opinion, the Circuit Court of Appeals said:

> "They" (the facts) "are supported by substantial evidence" (R. 179).

At another point in its opinion is the following language with reference to the facts:

> "And we think the finding is sound and fully established by substantial evidence" (R. 179).

And again, in its opinion, the court uses the following language:

> "The facts are supported by substantial evidence, and we think the conclusion is sound" (R. 180).

Not only will the Supreme Court decline to grant a writ of certiorari merely to review the evidence or inferences drawn therefrom, but when the decision rests on concurrent findings of fact they are not to be disturbed unless plainly without support. Under a well established rule

this court accepts the findings in which two courts concur, unless clear error is shown.

Texas & N. O. R. Co. v. Brotherhood of Railway & Steamship Clerks, 281 U. S. 548;
General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175;
In re Tax Service Association of Illinois, 305 U. S. 160.

THE THIRD PROPOSITION under "Questions Presented" is uncertain and ambiguous. The Petitioner probably is questioning the right of the Respondent to set off against the alleged preferential payments an amount equal to the total, including the item of $3,304.36, which was the amount of the overdraft at the beginning of the four-month period immediately preceding the bankruptcy. The courts found that the deposits were not made by the bankrupt or received by the Respondent for the purpose of building up such deposits for the benefit of the Respondent or to enable it to exercise its right of set-off, or with a view to such use (R. 154 and R. 176). With the facts thus established and supported by substantial evidence, under the law involved the Respondent is clearly entitled to the set-off under the provisions of **Section 68 (a)** and **Section 68 (b)** of the **Bankruptcy Act** and under the authority of the following cases:

New York County National Bank v. Massey, 192 U. S. 138;
Steedley v. Boylston National Bank, 229 U. S. 523;
Continental & Commercial Trust & Savings Bank v. Chicago Title & Trust Co., 229 U. S. 435.

(Again, the attention of the court is respectfully directed to the fact that this case is controlled by the provisions of the Bankruptcy Act prior to the amendments of June 22, 1938.)

Just what Petitioner is referring to when he questions the right of set-off against the bankrupt existing in favor of the Respondent bank at the beginning of the four-month period is not clear. The right of set-off exists at all times between a bank and its depositors so long as the deposit is not specially built up for the purpose of a set-off by the bank. If Petitioner is questioning the facts underlying the set-off by the Respondent in this case, then the court is respectfully referred to the preceding portions of this brief discussing this court's attitude towards questions of fact presented in a petition for a writ of certiorari.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

UNDER THIS HEADING, THE PETITIONER FIRST CONTENDS that the decision of the United States Circuit Court of Appeals for the Seventh Circuit in the instant case is in conflict with the United States Circuit Court of Appeals for the Fourth Circuit in the case of **Bank of Commerce and Trusts v. Hatcher, 50 Fed. (2d) 719.** The Petitioner fails to state precisely the language claimed to be conflicting or, where the language standing alone is consistent, show that in their necessary effect the cases stand for exactly conflicting rules. **8 Hughes Federal Practice, p. 540.** As a matter of fact, there is no conflict between the language or the holdings in the two cases.

In the Hatcher case, the deposit consisted of a check received under a contract which required the money to be deposited in the bank and paid out only on checks approved by the bank's vice-president. At the time of making the deposit in question, the bankrupt also presented for approval checks drawn on the deposit, which checks the vice-president refused to approve in order that the deposit

might be applied on the indebtedness. The opinion of the United States Circuit Court of Appeals for the Seventh Circuit in the instant case is in the record. (R. 174-180.) Compare it with the pertinent and appropriate language in the Hatcher case at p. 721, which is as follows:

> "It is perfectly clear that the transaction here involved did not constitute a deposit in regular course of business. The distinguishing characteristic of such a deposit is that it creates a balance in favor of the depositor which is subject to withdrawal at his will. Here the deposit lacked absolutely this characteristic. It was intended by the bankrupt to provide for the payment of certain checks which were presented for approval, not to create a balance in the bank subject to its control. It was received by the bank, not for the purpose of creating such balance, but for the purpose of being applied on the pre-existing indebtedness of the bankrupt. The balance created was at no time subject to the withdrawal of the bankrupt and was promptly applied by the bank upon the bankrupt's indebtedness. The net result of what took place was the transfer of the certified check of Luck & Sons to the bank as payment upon pre-existing indebtedness, not the creation of a deposit balance subject to withdrawal by the bankrupt in ordinary course."

The decision in the instant case is not in conflict with any one of the decisions in the cases cited by the Petitioner on page 13 of his brief. A short quotation from each will be sufficient to demonstrate this statement:

In **Rupp v. Commerce Guardian Trust & Savings Bank, 32 F. (2d) 234 (C. C. A. 6th)**, the court at page 235 says:

> "They were not accepted by appellee for deposit, but were taken by it—regardless of the purpose of the bankrupt—with the intention of applying them to the indebtedness of the bankrupt."

In **Frankfort Trust Co. v. Comber, 68 F. (2d) 471 (C. C. A. 3d)**, at page 472 the court says:

> ". . . On this evidence the verdict established that the bank had reasonable cause to believe that Baseman was insolvent and in taking Baseman's money through the channel of the corporation's deposit well within four months of bankruptcy it accepted or effected a preference."

In **Callaway v. West Balm Beach Atlantic National Bank, 69 F. (2d) 224 (C. C. A. 6th)**, on page 224 the court says:

> "We think it make no case of a deposit and a set-off in the usual course of business, but one of preferential payment."

In **Twentieth Street Bank v. Gilmore, 71 F. (2d) 594 (C. C. A. 4th)**, at page 595 the court says:

> ". . . . It appears that the funds constituting the deposit balance were unquestionably deposited while a committee of creditors was operating the business of the milling company, and that such deposits were not made in the ordinary course of business by the corporation, but under such circumstances as to constitute them a fund for the benefit of its creditors and to estop the bank from asserting against them any banker's lien or right of set-off."

In **First Wisconsin National Bank of Milwaukee v. Charness, 73 F. (2d) 730 (C. C. A. 7th)**, the court, in sustaining the finding and judgment of the District Court, at page 731 says:

> "The court held that the deposits of the proceeds of this special sale were not made in the ordinary course of business, but were the proceeds of a sale conducted by the company with the co-operation of the bank, and the payments made from a built up account."

THE SECOND REASON relied on for allowance of the writ asserts that the Circuit Court of Appeals in the instant case rendered an opinion and entered a judgment respecting recoverable preferences in bankruptcy in conflict with the general weight of authority. Respondent submits this reason is not within the meaning, purview or contemplation of **Rule 38, paragraph 5 (b), 28 U. S. C. A. following Section 354**, pertaining to the granting of a review on writ of certiorari to a Circuit Court of Appeals.

The rule by which this court is guided in exercising its power to grant writs of certiorari is announced in **Magnum Import Co. v. Coty, 262 U. S. 159**, in the following language:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing."

The opinion and judgment of the United States Circuit Court of Appeals for the Seventh Circuit in the instant case is in accord with the previous decisions of this court and of the Circuit Courts of Appeal wherein similar questions of fact were involved and similar points of law decided. Some of the cases in point have been previously cited in this brief. A few additional authorities are those referred to in the opinion of the Circuit Court of Appeals in the instant case (R. 180).

THE THIRD AND LAST of the "Reasons Relied on for Allowance of the Writ" asserts that the banking practice followed in this case and approved by the Circuit Court

of Appeals in its opinion and judgment raises questions of great public interest.

It is respectfully submitted this reason is not within the meaning, purview or intent of **Rule 38, paragraph 5 (b), 28 U. S. C. A.**, following Section 354. Furthermore, this is the assertion of an abstract proposition without showing its connection with or relevancy to any of the matters involved in or growing out of the opinion or decision in the instant case. Such banking practice as may be involved is entirely of a private nature and not of public concern. If the banking practices in contemplation of the Petitioner involve any statutes or laws or any legal principles, they are not in issue in the instant case.

CONCLUSION.

It is, therefore, respectfully submitted that the petition for the writ of certiorari should be denied.

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